U.S. Senate
Republican Policy
Committee

Larry E. Craig, Chairman
Jade West, Staff Director

Legislative Notice

Editor, Judy Gorman Prinkey

No. 12

May 9, 1997

S. 4 – The Family Friendly Workplace Act

Calendar No. 32

Reported from the Committee on Labor and Human Resources, with an amendment, April 2, 1997, on a 10 to 8 party-line vote. Additional and Minority Views filed. S. Rept. 105-11.

NOTEWORTHY

- On May 1, the Senate began consideration of the motion to proceed to S. 4. Subsequently, the motion was withdrawn. By UC, there will be discussion-only on the bill Friday, May 9 from 9:15a.m. to 12:30p.m. The Senate will return to debate on S. 4, Tuesday, May 13.

- S. 4, as reported, amends the 1938 Fair Labor Standards Act (FLSA) to allow private sector employers and employees a choice of three flexible work arrangements: (1) compensatory time off (i.e., time-and-a-half off) in lieu of monetary overtime pay; (2) biweekly work schedules (i.e., the option to work 80 hours over a two-week period in any combination); and (3) a flexible credit-hour program (i.e., the choice to "bank" any hours over 40 in one week for use toward paid leave later).

- On March 19, 1997, the House passed, by a vote of 222-210, H.R. 1, a bill to provide private sector employees the option of compensatory time off. At the time, the Administration issued a veto threat. H.R. 1 does not contain the biweekly schedules and flexible credit hour provisions (for employees who customarily do not work overtime) that are included in S. 4.

- The Administration has threatened to veto S. 4, citing among other concerns its belief that comp-time should be linked to expansion of the Family and Medical Leave Act. See "Administration Position," page 5 of this Notice.

HIGHLIGHTS

- S. 4 was introduced by Senator John Ashcroft on January 21, 1997, as one of the Leadership's top agenda items. It currently has 40 cosponsors.

- S. 4 amends the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off, biweekly work schedules, and flexible credit hour programs as federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes.

- Each of the options provided in S. 4 is entirely voluntary on the part of both the employer and the employee. Nonunion employees must enter these programs "knowingly and voluntarily" and remain entitled to the protections of the FLSA. Participation by union employees must be part of a collective bargaining agreement.

BACKGROUND

The Fair Labor Standards Act requires that hourly employees in the private sector be paid overtime (i.e., time-and-a-half) for any hours worked over 40 in a week. In general, salaried employees are "exempt" from the overtime provisions of the FLSA. The FLSA prohibits private sector employers from offering these types of flexible work schedules. However, federal employees (as well as state and local government employees) are allowed to receive comp-time and to participate in flexible work programs.

S. 4 would amend the FLSA to give private sector hourly employees (and their employers) a choice from among three mutually voluntary, flexible scheduling arrangements that are not available to them under the mandatory overtime requirements of the FLSA.

BILL PROVISIONS

Compensatory Time Off ("Comp-Time")

S. 4 would allow private sector employees to receive, on a voluntary basis, compensatory time off instead of overtime pay for hours worked in excess of 40 in a given week. The time off would be equal to one and one-half hours leave for each overtime hour worked. Under current law, private sector employees do not have the option of choosing between overtime pay and compensatory time off; they must be paid overtime. S. 4 would give employees the option to choose between taking "time-and-a-half off" (while still getting a full paycheck), or receiving the cash equivalent of the overtime worked. More specifically, the bill provides —

- An employee may bank up to 240 hours (160 hours at time-and-a-half) of compensatory time over a 12-month period. **The employer must "cash-out" any unused comp-time that has accrued at the end of the designated calendar year.**

- An employee must be allowed to use any accrued comp-time within a "reasonable period" of time of a request, provided that it does not "unduly disrupt" the workplace. This is the same standard for honoring leave requests that applies to public sector employees.

- An employer may cash-out an employee's comp-time accrued in excess of 80 hours.

- The bill requires that **nonunion employees** must "knowingly and voluntarily" enter into a comp-time agreement, and that the employee be given the choice to accept either monetary overtime pay or the accrual of comp-time for each workweek in which overtime is offered.

- A **nonunion employee's** decision must be in writing or "otherwise verifiable" and kept on file by the employer under the provisions of the FLSA. A nonunion employee may withdraw from a comp-time agreement by providing written notice to his or her employer.

- For **employees who are represented by a union,** comp-time must be offered as part of a collective bargaining agreement. The terms of a union employee's withdrawal from a comp-time arrangement will also be dictated in the collective bargaining agreement.

- Compensatory time off is treated as any other wage for the purposes of bankruptcy, pension, and unemployment benefits.

- In addition to the FLSA's existing overtime and antidiscrimination protections, **S. 4 establishes further prohibitions against employee coercion** in both the voluntary acceptance of a comp-time arrangement and the use of accrued comp-time.

Biweekly Work Schedules

Under a biweekly work schedule, an employee may work up to 80 hours in any combination over a two-week period. Current law does not allow private sector employees to "flex" their schedules beyond a 40-hour workweek. For example, an employee can currently choose to work four ten-hour days (e.g., Monday through Thursday) and take the fifth day off, but could not schedule ten-hour shifts for Mondays and Wednesdays in order to take off every other Friday. More specifically, the bill provides that —

- All hours worked by the employee in excess of the agreed upon biweekly schedule, or in excess of 80 hours in the two-week period, must be reimbursed at the overtime rate (i.e., at time-and-a-half pay).

- The same employee protections provided with respect to comp-time arrangements (i.e., written consent and the right to withdrawal) are extended to union and nonunion employees who choose to participate in a biweekly scheduling program.

Flexible Credit Hour Programs

Under a flexible credit hour arrangement, an employer and employee jointly agree on hours to be worked in excess of the employee's normal schedule for the express purpose of designating those additional hours as "flexible credit hours" to be used for subsequent paid time off. The bill makes these provisions —

- An employee can "bank" up to 50 flexible credit hours during a calendar year. The employer must provide monetary compensation for any hours left unused at the end of the year at the employee's normal rate of compensation.

- An employer must pay the overtime rate for any hours of work requested that are in excess of 40 hours in a given week and which have not been previously designated as flexible credit hours by the employer and an employee who has elected to participate in the flex-time program.

- As in the case with comp-time, an employee who chooses to participate in the flex-time program must be allowed, upon request, to use his or her credit hours within a reasonable period of time, provided that such use does not unduly disrupt the workplace.

- The same protections with respect to employee coercion and program withdrawal are extended to the flexible credit hour program.

Salary Basis Test For Employees

As reported, S. 4 contains language that would clarify the intent of Congress with respect to FLSA regulations for determining whether an individual is a salaried "exempt" employee or an hourly "non-exempt" employee under the act. In recent years, a number of court decisions have resulted in large monetary awards to salaried employees who have challenged their exempt status on the grounds that their employers had a personnel policy by which they could be "subject to" a reduction in pay for absences from work of less than a full day or less than a full pay period.

In general, salaried employees do not receive overtime pay for extra hours worked, nor do they generally lose pay when they take a day off. Yet multimillion dollar judgments have been awarded to highly paid employees who have successfully challenged their exempt status, not on the basis of any "actual" reduction in pay, but because their employer maintained a policy by which they were merely "subject to" such a reduction.

As the committee report states: "These awards have been awarded in spite of the fact that many of the plaintiff-employees have never actually experienced a pay deduction of any kind and have never expected to receive overtime pay in addition to their 'executive, administrative, or professional' salaries."

It is anticipated that a technical amendment will be offered regarding the salary basis text that will further clarify the intent of the bill's language.

ADMINISTRATION POSITION

Although press accounts have cited interest on the part of the Administration to reach a compromise on S. 4, the White House has issued a veto threat against the bill. A May 9, 1997 Statement of Administration Policy stated that the Administration "strongly opposes S. 4, as reported by the Senate Labor and Human Resources Committee . . . "

Chief among the Administration's demands are that the bill must include an expansion of the Family and Medical Leave Act and that the biweekly and flexible credit hour provisions of the bill be dropped entirely (note: the Administration has stated its opposition to the House bill despite the fact that it contains neither the biweekly nor credit hour provisions). The Statement of Administration Policy stated that "The President will veto S. 4 or any other compensatory time legislation that does not fulfill these principles."

POSSIBLE AMENDMENTS

During committee action on the S. 4, seven amendments offered by the minority were voted on and defeated prior to reporting out the bill favorably. Similar amendments may be offered during floor consideration of S. 4. The seven committee amendments were:

Wellstone: To permit the use of comp-time for any of the purposes described under the Family and Medical Leave Act. The amendment further mandates that employers grant their employees (within two weeks' notice) the use of any paid leave they have accrued.

Wellstone: To exclude from the provisions of S. 4 part-time, seasonal, and temporary employees as well employers in the garment business.

Wellstone: To delay the effective date of S. 4 until the Department of Labor has resolved 90 percent of its wage and hour complaints.

Wellstone: To require employers to treat comp-time off as hours worked for the purpose of calculating overtime and employee benefits.

Murray: To mandate that an employer provide 24 hours per year of unpaid leave for parental involvement in school activities.

Dodd: To expand the Family and Medical Leave Act to cover employers with 25 or more employees. [The FMLA currently exempts small businesses employing fewer than 50 employees within a 50-mile radius.]

Kennedy: To provide for quadruple damages against employers who are found to have violated the bill's nondiscrimination provisions.

Staff Contact: Jack Clark, 224-2946